BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF TELIGENT, INC.

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Teligent, Inc. hereby respectfully requests the Commission to reconsider its decision to address complaints about access to utilities' rights-of-way on a case-by-case basis and to clarify certain standards as they apply to the same.[1]

I. INTRODUCTION AND SUMMARY

Generally, the Telecommunications Act of 1996 and the efforts of the Commission aspire to elimination of those relative advantages of monopolist incumbency that could impair the development of local exchange competition (and the accrual of competitive benefits to consumers). A component of the utilities' incumbency is the control or ownership of public and

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[1] Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, FCC 98-20 (rel. Feb. 6, 1998)("Report & Order").

private rights-of-way for facility installation. Section 224 extends to telecommunications carriers access to those rights-of-way in order to facilitate the development of competition.

The Commission should clarify that Section 224's reference to rights-of-way includes those private rights-of-way secured by utilities through and on top of buildings. Moreover, the Commission should emphasize that nondiscriminatory access to these rights-of-way must be provided on just and reasonable terms. Finally, consistent with its statutory obligations, the Commission should offer more specific guidance as to the meaning of "just and reasonable" access to rights-of-way.

The use of bare utility rights-of-way facilitates the provision of fixed wireless services and CLEC offerings. Yet, some building owners impose unreasonable barriers to building access (examples of which are provided below) which threaten to diminish consumer welfare. Commission actions consistent with this Petition will advance the facilities-based delivery of competitive benefits to consumers.

II. THE REPORT & ORDER FAILS TO ACHIEVE THE COMMISSION'S STATUTORY OBLIGATIONS.

The Commission recognizes that a utility must provide a requesting telecommunications carrier with nondiscriminatory access to any right-of-way owned or controlled by it.[2] However, the Report & Order goes on to explain that "there are too many different types of rights-of-way" to develop a rate methodology.[3]

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[2] Id. at ¶ 117.

[3] Id. at ¶ 120.

Moreover, it notes the varied state and local restrictions that may burden rights-of-way.[4] Finally, the Commission claims it possesses insufficient information to adopt detailed standards to govern all right-of-way situations.[5] Consequently, the Report & Order declines to adopt a methodology, declines to adopt detailed access and rate standards, and decides to address right-of-way access and rate complaints on a case-by-case basis. In short, the Report & Order does little more to advance right-of-way access than acknowledge that Section 224's terms extend to rights-of-way. The Commission's inaction is legally insufficient and carries negative implications for local exchange competition.

The language of Section 224 is mandatory, not permissive; it imposes upon the Commission an obligation to govern in an affirmative manner the charges for access to rights-of-way. Specifically, the statute states that "the Commission shall regulate the rates, terms, and conditions" for access to rights-of-way,[6] "shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions,"[7] and "shall prescribe by rule regulations to carry out the provisions of this section."[8] Moreover, the statute states that "[t]he Commission shall . . . prescribe regulations .

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4 Id.

5 Id. at ¶ 121.

6 47 U.S.C. § 224(b)(1)(emphasis added).

7 Id. (emphasis added).

8 47 U.S.C. § 224(b)(2)(emphasis added).

. . to govern the charges for [rights-of-way]."[9] Established canons of statutory interpretation direct construction of "shall" as an imperative instruction.[10] The Commission must do more than concede the operation of the statute; it must act to implement it.

The statute also prescribes the manner in which the Commission exercises its obligations. Typically, in developing law and policy, an administrative agency retains the discretion to utilize either adjudicatory or rulemaking processes.[11] In this instance, however, the statute removes such discretion from the Commission through elimination of the adjudication option. The Act expressly requires the Commission to prescribe rules rather than adjudicate matters on a case-by-case basis.[12] Properly considered, the language of Section 224 imposes upon the Commission an affirmative obligation to establish rules governing the rates and terms of access to rights-of-way. The Report &

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9 47 U.S.C. § 224(e)(1)(emphasis added).

10 See, e.g., Bennett v. Spear, 117 S.Ct. 1154, 1167 (1997)(referring to "shall" as imperative language); Anderson v. Yungkau, 329 U.S. 482, 485 (1947)("The word 'shall' is ordinarily the 'language of command.'")(citing Escoe v. Zerbst, 295 U.S. 490, 493 (1935)).

11 See S.E.C. v. Chenery Corp., 332 U.S. 194, 203 (1947)("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

12 47 U.S.C. §§ 224(e)(1)("The Commission shall . . . prescribe regulations . . . to govern the charges for [rights-of-way] used by telecommunications carriers to provide telecommunications services . . . . Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for [rights-of-way].").

Order's abdication of this responsibility in favor of a more ad hoc approach is legally deficient.

An active Commission role in securing nondiscriminatory access to rights-of-way at just and reasonable rates is necessary to accomplish the broader objective of Section 224: making available, through regulatory intervention, the bottleneck facilities to which access is a prerequisite for effective local exchange competition.[13] Local utility monopolists -- whether electric utilities, incumbent local exchange carriers, or gas companies -- have no incentive beyond regulatory compliance to permit competitors (or potential competitors) access to their essential facilities. The level of vigor with which the Commission pursues access to rights-of-way for competitive telecommunications carriers will relate not only to the speed with which local exchange competition develops but also to the effectiveness of that competition.

The passive approach taken by the Report & Order does little to promote the policy behind Section 224. Carriers and utilities receive little guidance from a case-by-case method of addressing right-of-way access.[14] Moreover, this ad hoc approach provides

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13 See Report & Order at ¶ 2 ("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."); see also id. at ¶ 5 (noting "Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants").

14 See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Second*

no disincentive to utilities to resist right-of-way access requests or otherwise charge unreasonable rates. By contrast, some guidance from the Commission will facilitate negotiations for access to utilities' rights-of-way. The Commission affirms its belief

> that the existing methodology for determining a presumptive maximum pole attachment rate . . . facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate.[15]

Although this rationale holds equally true for rights-of-way, it is not so applied in the Report & Order.

The Report & Order alludes to the restrictions on rights-of-way imposed by state and local laws as a barrier to developing a generally applicable right-of-way rate methodology. In this instance, federalist principles do not excuse compliance with statutory obligations.[16] Section 224 and the rest of the

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Report and Order and Memorandum Opinion and Order, 4 CR 484 at ¶ 231 (1996)("Requiring carriers to litigate the meaning of 'reasonable' notice through our complaint process on a case-by-case basis might slow the introduction and implementation of new technology and services, and burden both carriers and the Commission with potentially lengthy, fact-specific enforcement proceedings.").

15 Report & Order at ¶ 16.

16 Generally considered, the effect of the federal law must be deemed to prevail over State law in the event of a conflict. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941)(federal law will prevail over State law where the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). Although 47 U.S.C. 152(b) generally denies the Commission authority over intrastate communications, in the appropriate circumstances, Commission preemption of inconsistent state regulation is permissible under the "impossibility exception." See Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 375 (1986). This exception gives effect to the notion that "Congress has recognized the existence of areas of common national and state concern and has provided a

Communications Act make it inappropriate and insufficient for the Commission to pass responsibility for access to rights-of-way to States and municipalities; it must prescribe federal rules.[17]

Jurisdictionally, the Commission's authority to regulate rights-of-way within and on top of cultural features such as office buildings is unquestionable and long-standing. Section 224 provides a clear and direct command to prescribe rules governing the rates and terms for telecommunications carriers' access to utilities' rights-of-way.[18] Given the Commission's expansive jurisdiction and the compelling reasons for actively ensuring just, reasonable, and nondiscriminatory access to utilities' rights-of-way, it is inadequate for the Commission to abdicate such responsibility to States and municipalities.

III. THE COMMISSION SHOULD CLARIFY THE PARAMETERS OF REASONABLE RIGHT-OF-WAY ACCESS TERMS AND RATES.

If the Commission deems a generally applicable right-of-way rate formula unworkable at this time, it nevertheless is entirely appropriate -- indeed, advisable -- for the Commission to offer some additional definition and explanation of access rights and rate ceilings in the context of rights-of-way. Clarification of reasonableness in the right-of-way context will smooth

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procedure under which national primacy is recognized." North Carolina Utilities Comm'n v. F.C.C., 537 F.2d 787, 794 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976).

17 Of course, Section 224 contemplates assumption of right-of-way responsibility by some States. 47 U.S.C. § 224(c). However, the Commission must develop rules for those States that choose not to regulate rights-of-way consistent with the requirements of Section 224.

18 47 U.S.C. § 224(e)(1).

negotiations between parties and otherwise reduce inefficient transaction costs of entering into right-of-way access agreements.

For example, the Commission should confirm that Section 224 access rights apply to private rights-of-way that exist within buildings and on building rooftops. The premise appears self-evident. However, the Commission's reluctance to extend access to rooftops of ILEC corporate buildings qua corporate property[19] has led some parties to conclude erroneously that the Commission's narrow statement implicated even those buildings through which a utility retains private rights-of-way. The Commission should eliminate the confusion by confirming that Section 224's access extends to utilities' private rights-of-way through buildings (including rooftops).[20] Moreover, the Commission should emphasize that utilities must provide this access to telecommunications carriers and cable operators on a nondiscriminatory basis.[21]

At minimum, to be consistent with the statute's direction, the Commission must develop a general proposition of just and

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19 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1185 (1996).

20 As Teligent explained in its comments, the rights-of-way to which telecommunications carriers are granted access in Section 224 are not limited to public rights-of-way (in contrast to Section 253(c), for example), but include private rights-of-way, as well. See Teligent Comments at 6. This extends Section 224's application beyond public thoroughfares into rights-of-way secured through private property, such as office buildings.

21 47 U.S.C. § 224(f)(1).

reasonable rates and access conditions for rights-of-way. The Commission's statutory responsibility may not require the Commission to establish the actual rates for right-of-way access or to exhaustively list the terms of a just and reasonable agreement. Nevertheless, identification of even notional parameters would promote negotiated agreements in the same manner that the formula for pole attachment rates "facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate."[22] Moreover, general parameters for just and reasonable rates and terms for right-of-way access will provide a known standard to apply in the resolution of complaints.

The pro-competitive goals of the 1996 Telecommunications Act would be well-served by additional definition and explanation of right-of-way access rights and rate ceilings.[23] In furtherance of those goals, the Commission should emphasize that utilities must provide telecommunications carriers with nondiscriminatory access to rights-of-way on just and reasonable terms, including those rights-of-way located within buildings and on building rooftops.

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22 Report & Order at ¶ 16. Indeed, the Commission identified stalled negotiations as an impediment to competition. See id. at ¶ 17 ("Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other.").

23 See id. at ¶ 5 (noting "Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants")(citation omitted).

IV. FIXED WIRELESS CARRIERS AND OTHER CLECS USE RIGHTS-OF-WAY WITHOUT ATTACHING TO THE UTILITY'S FACILITIES.

The Report & Order asserts a general dearth of examples in the record of right-of-way use not involving attachment to a utility's facilities.[24] If true in practice, the Commission's observation would suggest the need for regulatory intervention to make available the right-of-way access that, until this time, has remained generally unavailable to telecommunications carriers. Indeed, Teligent provided examples in this proceeding of the need for access to utility rights-of-way for the provision of fixed wireless service.[25] The Association for Local Telecommunications Services ("ALTS") recently informed the Commission that building access is of central importance to competitive telecommunications carriers.[26] Moreover, BellSouth predicts demand for bare rights-of-way within buildings to be sufficiently substantial that it expressly provides for such access in its CLEC Information Package.[27] The Commission, too, should recognize the competitive utility and predictable growth in demand for access to bare rights-of-way by prescribing appropriate rules.

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24 Id. at ¶ 120.

25 Teligent Comments at 9 ("Fixed wireless CLECs will seek access to building rooftops through their right-of-way access rights under Section 224.").

26 See Heather Burnett Gold, President, Association for Local Telecommunications Services *En Banc* Presentation before the Federal Communications Commission, Jan. 29, 1998 at 11. ALTS encouraged the Commission to resolve the building access issue through its Section 224 right-of-way authority. Id.

27 Teligent Reply Comments at 14 (quoting Application by BellSouth Corporation for Provision of In-Region, InterLATA Services, CC Docket No. 97-208, *Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina*,

The need for clear and enforceable utility right-of-way access obligations is particularly compelling in light of the resistance of some building owners to allowing competitive carriers to serve the tenants in their buildings. For example, Teligent sought a building access agreement with a large property holding and management company with properties nationwide. This company required an agreement fee of $2,500 per building in addition to space rental of approximately $800 to $1,500 per month per building (or $6,000 per month per building for nodal sites). Moreover, the company refused to negotiate an agreement for fewer than 50 buildings. Finally, as a condition of entering into the agreement, the company insisted that Teligent agree to refrain from making any regulatory filings concerning the building access issue. Yet another large property owner and management company demanded $10,000 per month per building just for access rights to building risers. These onerous and unreasonable conditions quite obviously render competitive telecommunications service an uneconomic enterprise in these buildings.[28] Unless access to utilities' in-building rights-of-way can be gained at just and reasonable rates, the tenants of these buildings may not enjoy the benefits of telecommunications competition.

Attachment to Affidavit of W. Keith Milner, Appendix A, Exh. WKM-9, "CLEC Information Package: Access to Poles, Ducts, Conduit and Right of Way" at 3 (filed Sep. 30, 1997)).

[28] Teligent ultimately did not enter into agreements with these companies.

In many instances, a competitive carrier will be able to access tenants in a building only through use of the incumbent utilities' rights-of-way. It is therefore imperative that the Commission establish clear and enforceable rules governing access to rights-of-way within buildings and on building rooftops.

V. CONCLUSION

For the foregoing reasons, Teligent respectfully requests that the Commission reconsider its Report and Order in this docket and prescribe rules and more specific guidance concerning utilities' provision of nondiscriminatory access to rights-of-way, including those within and on top of buildings, at rates and terms that are just and reasonable.

Respectfully submitted,

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Dated: April 13, 1998

CERTIFICATE OF SERVICE

I, Gunnar D. Halley, do hereby certify that on this 13th day of April, 1998, copies of the foregoing "Petition for Reconsideration and Clarification of Teligent, Inc." were delivered by hand to the following parties:

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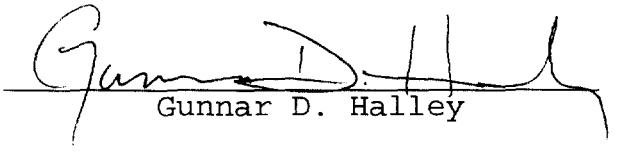

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